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No. 664

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

NEW YORK SHIPPING ASSOCIATION, INC., and INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO,

Petitioners,

v.

WATERFRONT COMMISSION OF NEW YORK HARBOR,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION

IRVING MALCHMAN
Director of Litigation and Research
of the Waterfront Commission of
New York Harbor
Attorney for Respondent
150 William Street
New York, New York
212-964-3520

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Statement

Petitioners herein (the New York Shipping Association, Inc. ("NYSA") and the International Longshoremen's Association ("ILA"), seek a writ of certiorari to review a judgment of the United States Court of Appeals for the Third Circuit, affirming without opinion the judgment of the United States District Court for the District of New Jersey granting summary judgment to respondent Waterfront Commission.

This is an action by the NYSA and ILA for a declaratory judgment, together with accompanying injunctive relief, that Commission Determination No. 15, dated March 17, 1978 (1a*) providing for the transfer of 200 longshoremen to checker status to alleviate a critical shortage of checkers

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* References to "a" are to the Appendix to the Commission's brief in the Court of Appeals.

in the Port of New York and New Jersey which was impairing the effective operations of the Port is unlawful because it is unauthorized by the Waterfront Commission Compact and also because it interferes with federally protected collective bargaining rights. (Basically a longshoreman does the work involved in the loading and unloading of ships whereas a checker does the paper work involved in tallying the cargo.) Under the Waterfront Commission Act a checker is a "longshoreman" (McK. Unconsol. Laws 9905(5); N.J.S.A. 32:23-85(5)). The NYSA is the collective bargaining representative of the employers (steamship companies and stevedores) of waterfront workers in the Port and the ILA is the union that represents those employees.

Commission Determination No. 15 was made after a hearing (as to which the NYSA and ILA were given notice but which they boycotted) (8a) held pursuant to the specific statutory authority of the Commission to regulate, in the public interest, the size of the work force in the Port (App. D to petition, pp. 27a-30a). Commission Determination No. 15 adds (by the transfer of longshoremen) 200 checkers to the present work force of approximately 2,000 checkers in the Port. The NYSA and ILA concede that there was a shortage of checkers in the Port and that the Waterfront Commission Compact empowers the Commission to regulate the size of the work force in the Port. The NYSA and ILA contend, however, that the Commission can eliminate the shortage of checkers only by adding new workers from outside the industry—and not by permitting a voluntary transfer of longshoremen to checker status notwithstanding the fact that there is a surplus of longshoremen in the Port.

The present work force of longshoremen in the Port consists of about 9,200 longshoremen and 2,000 checkers (8a). Of these, during the last contract year, about 500 received full Guaranteed Annual Income ("GAI") pay-

ments of $16,640 for doing no work at all and an additional 2,000 longshoremen received at least $10,000 in GAI payments (8a). Commission Determination No. 15 provides, as stated, for a *voluntary* transfer of 200 longshoremen to checker status in order of seniority with a preference being given to those longshoremen who are physically incapable of satisfactorily performing as longshoremen but who would be capable of performing as checkers and who desire to become checkers (3a-5a).

There was, as stated, no dispute between the parties as to the need for additional checkers in the Port. The point of difference, which had blocked an amicable solution to the checker shortage, ever since the summer of 1976, was the ILA's demand for a package solution which would give the ILA patronage by permitting the ILA to bring in from outside the industry some of the additional persons to be registered by the Commission as checkers (15a), a procedure which would be in direct contravention of the statutory provision providing that any addition of men to the work force shall be done by the Commission upon a first-come, first-served basis, that is, "application . . . shall be processed in the order in which they are filed with the commission" (McK. Unconsol. Laws 9920(1); N.J.S.A. 32:23-114).

Because the problem of the checker shortage had reached such proportions that it could no longer be temporized with, the Commission determined to act, held the hearing required by law, and then issued its Determination No. 15 in which the Commission requested the cooperation of management and labor in effecting the transfer of 200 persons from longshoremen to checker status (18a, 3a-4a). Further negotiations followed with the NYSA and ILA which again broke down (18a). The Commission then proceeded with the implementation of Determination No. 15 (which the Commission had postponed several times) in order to permit negotiations to continue (18a). The instant action then ensued.

Reasons for Denying the Writ

I

Commission Determination No. 15 is entirely proper under Section 5-p of the Waterfront Commission Act and is in no respect "arbitrary, capricious and an abuse of discretion".

It is the intendment of Section 5-p to vest the Waterfront Commission with the greatest possible discretion in determining the manpower needs of the Port and in implementing the standards enumerated in Section 5-p for the Commission's guidance in exercising such discretion.

Thus, Subsection 1 of Section 5-p authorizes the Commission to make determinations to accept, or suspend the acceptance of, applications for inclusion in the longshoremen's register, that is, to open and close the register. Subsection 2 enumerates certain standards of extremely broad scope for observation by the Commission in administrating its power to open and close the longshoremen's register, such as "To encourage the mobility and full utilization of the existing work force of longshoremen" (2(c)) or "To consider the effect of technological change and automation and such other economic data and facts as are relevant to a proper determination" 2(f). Then, Section 5-p specifically provides in Subsection 3 that the Commission's determination shall be subject to judicial review only "for being [in the conjunctive] arbitrary, capricious and an abuse of discretion".

It would be difficult to write a broader grant of discretionary authority to an administrative agency.

Petitioners contend that Section 5-p limits the Commission to the addition of new workers from outside the industry. This contention does not withstand scrutiny.

First, there is nothing in Section 5-p that says the Commission, in opening the register, must take workers from outside the industry. Further, one of the statutory standards set forth in Subsection 2(d) of Section 5-p for the observance of the Commission in exercising its discretion is "To encourage the mobility and full utilization of the existing work force of longshoremen". In view of the fact that there is presently a surplus of longshoremen in the Port, many of whom are collecting millions of dollars annually in GAI payments, it makes absolutely no sense whatever—much less constitutes an abuse of discretion—for the Commission to bring in new workers from outside the industry when there are already available a number of longshoremen who desire to work as checkers.

It would be a total absurdity for the Commission to require longshoremen who have been working many years in the industry and who desire to become checkers to get in line with new workers with no equity whatever on the waterfront in order to transfer to checker status.

A recurring refrain of petitioners is that the Commission is establishing seniority categories in derogation of petitioners' collective bargaining rights. Such is not the case at all. As would be true with the addition of new workers from outside the industry, the Commission in permitting a transfer of 200 longshoremen to checker status is simply adding men to the available work force. Petitioners NYSA and ILA are free to give whatever seniority rights they desire to the additional checkers, including the withholding of seniority entirely, provided that they do not nullify the Commission's determination by prohibiting the individual employers from employing these new additions to the checker work force. Once these 200 longshoremen are added to the checker work force, it then is up to each individual employer to decide whether or not he wishes to avail himself of these additional workers. The Commission does not require any individual employer to employ these new additions to the checker work force.

Petitioners also contend that the Commission, in giving preference to those longshoremen who are physically incapable of satisfactorily performing as longshoremen but who will be capable of performing as checkers, is establishing a new seniority category in derogation of plaintiffs' collective bargaining rights. Again, all that the Commission is doing is making such disabled longshoremen available for employment by the individual employers, with the NYSA and ILA being free to grant these new checkers whatever seniority—or indeed no seniority at all—that they desire, just as would be true with the addition of new workers from outside the industry.

In addition to providing in Subsection 2(c) of Section 5-p that the Commission shall seek "To encourage the mobility and full utilization of the existing work force of longshoremen", Subsection 2(d) expressly mandates the Commission "To protect the job security of the existing work force of longshoremen". Certainly, it is not "arbitrary, capricious and an abuse of discretion" for the Commission to serve these mandated standards by giving the physically disabled longshoremen a preference in applying for a transfer to checker status.

Petitioners repeatedly invoke in support of their position herein the provisions in the Compact, as well as in Section 5-p, safeguarding the right to engage in collective bargaining. However, the right to engage in collective bargaining safeguarded by the Compact, as well as by Section 5-p, is simply the right to bargain collectively *subject* to the substantive provisions of the Compact.

For example, the safeguard in the Compact of the right to engage in collective bargaining does not mean that a collective bargaining agreement can provide that longshoremen shall be hired through union hiring halls in derogation of the requirement of the Compact that longshoremen shall only be employed through Commission employment information centers (McK. Unconsol. Laws 9853;

N.J.S.A. 32:23-53) or provide minimum standards of application for work for longshoremen to remain in the industry in derogation of the minimum standards established by the Commission pursuant to its statutory power to periodically remove from the Register longshoremen who do not apply for work regularly as prescribed by the Commission (McK. Unconsol. Laws 9834; N.J.S.A. 32:23-34). Similarly the safeguard in Section 5-p of the right to bargain collectively does not mean that the NYSA and ILA in a collective bargaining agreement may regulate the size of the work force in the Port, thereby nullifying Section 5-p which vests the Commission—and not the NYSA and ILA—with the power to regulate the size of the work force.

II

Since Section 5-p is part of the Waterfront Commission Compact which has been approved by Congress, there is no tenable basis for petitioners' claim that Commission Determination No. 15 pursuant to Section 5-p is preempted by federal labor law.

If Determination No. 15 is found to be authorized by Section 5-p, then such a decision makes untenable any claim that Determination No. 15 invalidly conflicts with federal labor law because then the question would become the constitutionality of a valid application by the Commission of Section 5-p. Since Section 5-p is within the consent of Congress to the Waterfront Commission Compact, the *valid* application of Section 5-p, no more than Section 5-p itself, cannot be deemed to be preempted by federal labor law.

The Waterfront Commission Compact is an interstate compact between the States of New York and New Jersey which has been approved by Congress (67 Stat. 541). If Section 5-p had been enacted as part of the original Waterfront Commission Compact to which Congress had consented, there could be no basis whatever for petitioners' claim of federal preemption.

For example, in sustaining the constitutionality of Section 8 of the Waterfront Commission Act, which prohibits the collection of dues for waterfront unions having criminals as officers or employees and which has the legal status of independent state statute since it is not part of the Compact, the Court in *DeVeau* v. *Braisted,* 363 U.S. 144 (1960), relied upon the fact that Congress was mindful that Section 8 is part of the Waterfront Commission Act (which includes the Compact as Part I). The Court concluded from this that Congress in approving the Compact had demonstrated its intent, even though Section 8 is not formally part of the Compact, that Section 8 should stand despite the provision of National Labor Relations Act granting employees the right to bargain collectively through representatives of their own choice.

In *DeVeau,* the Court said, "Had § 8 been written into the Compact, even the most subtle casuistry could not conjure up a claim of pre-emption" (363 U.S., at p. 153). Here, although Section 5-p was not part of the original Compact approved by Congress, Section 5-p was enacted as "an agreement between the state of New York and New Jersey, supplementary to the waterfront commission compact and amendatory thereof" (1966 N.Y. Laws, c. 127, § 5; 1966 N.J. Laws, c. 18, § 4).

In approving the Compact, Congress itself, formally recognized that the conditions on the New York waterfront were primarily a matter for local regulation. This is reflected in the unusually broad scope of its consent to the Waterfront Commission Compact which consents to future, as well as present, legislation and which, moreover, does not reserve any federal jurisdiction with respect to regulation of interstate or foreign commerce. Thus, the Congressional consent to the Waterfront Commission Compact provides (67 Stat. 541):

> "The consent of Congress is hereby given to the compact set forth below, to all of its terms and provisions,

> and to the carrying out and effectuation of said compact, and enactments in furtherance thereof."

In *DeVeau*, the Court stated the following respecting the scope of the Congressional consent to the Waterfront Commission Compact, which is unprecedentedly broad in providing for future supplementary state legislation (363 U.S., at p. 154):

> "Finally, it is of great significance that in approving the compact Congress did not merely remain silent regarding supplementary legislation by the States. Congress expressly gave its consent to such implementing legislation not formally part of the compact. This provision in the consent by Congress is so extraordinary as to be unique in the history of compacts. Of all the instances of congresional approval of state compacts —the process began in 1791, Act of Feb. 4, 1791, 1 Stat. 189, with more than one hundred compacts approved since—we have found no other in which Congress expressly gave its consent to implementing legislation. It is instructive that this unique provision has occurred in connection with approval of a compact dealing with the prevention of crime where, because of the peculiarly local nature of the problem, the inference is strongest that local policies are not to be thwarted."

Section 5-p was enacted pursuant to this broad consent by Congress to future legislation by the States supplementary to the purposes and objectives of the Waterfront Commission Compact. And in point of fact, petitioners make no claim herein that Section 5-p itself is in any way invalid. Rather, the petition specifically states that in this case "the validity of § 5-p was not in issue" (p. 12).

III

Moreover, this is a singularly inappropriate case in which to consider a claim of conflict with federal labor policy because here that issue is seriously complicated by questions of unclean hands and abstention.

Petitioners seek certiorari mainly on the contention that Commission Determination No. 15 is in conflict with federal labor policy. But before that issue is even reached, substantial questions involving the doctrine of unclean hands and also the abstention doctrine must first be decided. These complicating questions make this case singularly inappropriate for consideration upon certiorari.

A.

As noted, petitioners' action is for a declaratory judgment together with accompanying injunctive relief. An action for an injunction is of course subject to the equitable defense of unclean hands. The same is true respecting petitioners' request for a declaratory judgment.

As has been stated by the Court, "A declaratory judgment, like other forms of equitable relief, should be granted only as a matter of judicial discretion exercised in the public interest." *Eccles* v. *Peoples Bank,* 333 U.S. 426, 431 (1948). More particularly, "the declaratory judgment and injunctive remedies are equitable in nature, and . . . equitable defenses may be interposed." *Abbott Laboratories* v. *Gardner,* 387 U.S. 136, 155 (1967). It has accordingly been held, in an action for declaratory judgment and injunction, that relief will be denied where the plaintiff came into court with unclean hands. *ESP Fidelity Corp.* v. *Department of Housing and Urban Development,* 512 F.2d 887 (9th Cir. 1975); *Lumbermans Mutual Casualty Company* v. *Quick,* 257 F.Supp. 252 (D.S.C. 1966) (inequitable conduct by plaintiff).

The NYSA and ILA seek to have this Court grant certiorari to set aside a Commission determination that adds men to the checker work force in order to eliminate a conceded shortage of checkers in the Port. In presenting their case, the petition of the NYSA and ILA speaks, in exalted terms, of the federally protected right to engage in collective bargaining. The real considerations underlying this action are much more mundane, however.

The ILA, together with its acquiescent partner in litigation, the NYSA, are in court because of the Commission's refusal to accede to the ILA's illegal demand (aided and abetted by the NYSA) for patronage as the price for permitting a transfer of longshoremen to checker status to eliminate the shortage of checkers. It is accordingly clear that the ILA and NYSA are guilty of inequitableness or bad faith relative to the matter as to which they seek judicial relief and that therefore they do not come into court with clean hands. E.g., *Precision Instrument Mfg.* v. *Automobile Maintenance Machinery Co.*, 324 U.S. 806, 814-816 (1945).

B.

In consenting to the Waterfront Commission Compact, Congress recognized that conditions on the New York waterfront were primarily a matter for local recognition. This is reflected in the unusually broad scope of its consent to the Waterfront Commission Compact, which consents to future, as well as present, legislation and which, moreover, does not reserve any federal jurisdiction with respect to regulation of interstate or foreign commerce (*supra*, pp. 8-9).

Further, in addition to constituting the Commission a "body corporate and politic and the instrumentality of the states of New York and New Jersey" (McK. Unconsol. Laws 9807; N.J.S.A. 32:23-7), the Compact specifically provides that the Commission's action in denying any application for a license or registration or in revoking or

suspending any license or registration "shall be subject to judicial review by a proceeding instituted in either state at the instance of the applicant, licensee or registrant in the manner provided by the law of such state for review of the final decision or action of administrative agencies of such state" (McK. Unconsol. Laws 9851; N.J.S.A. 32:23-51). The Compact also provides that, "The failure of any witness, when duly subpoenaed [by the Commission] to attend, give testimony or produce other evidence, whether or not at a hearing, shall be punishable by the superior court in New Jersey and the supreme court in New York in the same manner as said failure is punishable by such court in a case therein pending." (McK. Unconsol. Laws 9862; N.J.S.A. 32:23-62).

The Compact thus specifically provides for litigation in the state courts respecting Commission actions and determinations. In enacting Section 5-p as an amendment to the Compact, the States of New York and New Jersey similarly provided for judicial review of Commission determination thereunder in the state courts. The NYSA and ILA in this case seek to circumvent the express provisions of Section 5-p for judicial review of Commission determinations in the state courts.

The federal courts should not sanction this attempted end run around Section 5-p by the NYSA and ILA. Instead, dismissal of this action is mandated under the abstention doctrine. *Alabama Public Service Commission* v. *Southern Railway Co.*, 341 U.S. 341 (1951); *Burford* v. *Sun Oil Co.*, 319 U.S. 315 (1943).

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for certiorari should be denied.

Respectfully submitted,

IRVING MALCHMAN
Director of Litigation and Research
of the Waterfront Commission of
New York Harbor
Attorney for Respondent
150 William Street
New York, New York
212-964-3520

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